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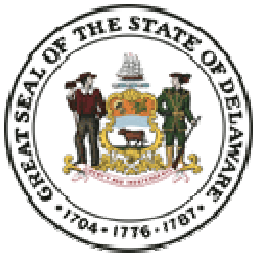

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

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DELAWARE SUPREME COURT CASES
OCTOBER 1, 2009 THROUGH JANUARY 31, 2009

MUMMIT V. STATE, (10/6/09): PHYSICAL INJURY

V was D's teenage granddaughter and lived with D and her step grandmother. D punished V and her twin sister by beating them and sexually abusing them. After one beating, when V tried to hide a bad grade on her report card, the step grandmother filed for a PFA. D wanted to speak w/V at school. V was scared and told the guidance counsel about the beatings and other abuse. After a trial, D was convicted for 13 charges, which included assault third.

On appeal, D argued that the assault charge should have been dismissed because the one beating at issue did not cause "impairment of physical condition" or "substantial pain" and therefore there was no physical injury. The only evidence was that V was heard crying and later said her buttocks were sore when the grandmother tapped her there. The Court found that this was sufficient for a jury to infer V suffered "substantial pain." AFFIRMED.

WESCOTT V. STATE, (10/13/09): DOUBLE JEOPARDY/COLLATERAL ESTOPPEL/SENTENCING

D was at a party where pandemonium ensued. D was accused of shooting V during a fracas. He was indicted on attempted murder 1st, possession of a firearm during the commission of a felony, and possession of a firearm by a person prohibited. The court severed the PFBPP charge and D went to trial on the other offenses. He was acquitted of those other offenses. D then went to trial on the PFBPP and was convicted. At the time of the offense, D was on probation for reckless endangering involving the firing of the same caliber gun.

On appeal, D argued that his conviction of PFBPP violated double jeopardy and collateral estoppel as he was already acquitted of attempted murder and PFDCF. The Court disagreed, finding that double jeopardy was not implicated since each of the crimes contained an element that was not in the other crimes. To prove PFBPP the state had to prove D committed a felony and D possessed a gun during that felony. Additionally, the jury's acquittal did not necessarily reflect a conclusion that D never possessed a gun at the time of the alleged attempted murder. Thus, collateral estoppel was not violated.

D also argued that the judge's failure to set forth a proper record at sentencing allows for the conclusion that a maximum sentence was imposed because the judge thought he "got away" with the more serious offenses. The Court found nothing indicating the judge relied on impermissible factors in sentencing D. D's record

supported the judge's statement that D was a "very violent man." The Court also held that the D's argument that the sentencing judge did not adequately articulate his reasons for the sentencing decision as required by *Pearce* did not apply here. That case is limited to the facts involving a conviction, appeal, reversal, and then reconviction. AFFIRMED.

HALL V. STATE, (10/13/09): REASONABLE SUSPICION TO STOP

P observed D sitting in a car parked in the lot at a 7-11. Another car entered the lot and parked off to the side and next to D despite available spaces in ront of the store. D went over to the car and got in the back seat. P approached the car and saw D put his hand behind his back. P ordered D to pull his hand out and D refused. D was taken from the car and P detected the odor of PCP in the car. P searched the car and found a cigarette dipped in PCP behind the driver seat. D was arrested and a strip search revealed a vial of PCP in his buttocks. D's probation officer was contacted. He found 4 more vials with PCP residue at D's house. D was convicted of PWITD, possession of drug paraphernalia, possession of a controlled counterfeit substance, and conspiracy second.

On appeal, D argued that all of the evidence was "fruit of the poisonous tree" because the officers lacked reasonable, articulable suspicion to detain him. The Court held that the trial judge properly relied on *Lofland v. State*. It found that, through the eyes of an officer trained and experienced in street-level drug sales, the totality of the circumstances prior to the stop created a reasonable articulable suspicion. This was a known drug area; D waiting in lot; other car pulled up to side; and P watched for several minutes. The Court also held that the car was not searched "incident to arrest." Rather the odor of PCP created probable cause to search the car. AFFIRMED

BETTS V. STATE, (11/3/09): *NOLLO CONTENDRE*/ SEX OFFENDER TREATMENT REQUIREMENT TO ADMIT CONDUCT

D pled *nolo contendere* to six counts of unlawful sexual contact third degree. The plea agreement required D to register as a tier II sex offender and complete a sexual disorder counseling program. D was also required to follow all treatment recommendations. However, the treatment provider discharged D after he refused to discuss any of the illegal sexual contacts underlying his plea. D argued that admitting he did the crimes ran counter to his plea of *nolo contendere*. The judge found D violated probation.

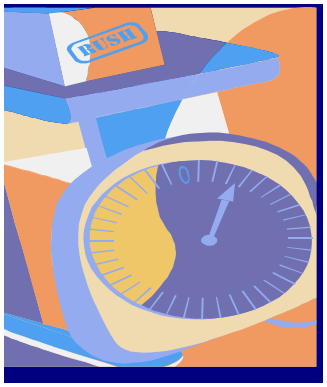
On appeal, the Court affirmed the decision because a judge offers probation on the rational assumption that effective counseling acts as a viable preventative alternative to incarceration. Therefore, a D that gains the benefits of a plea bargain must uphold his concomitant obligations. Here, D agreed to follow treatment recommendations and failed to do so. AFFIRMED.

HEATH V. STATE, (11/4/09): PARDON & RELIEF FROM S.O. REGISTRATION

D pled guilty to unlawful sexual contact second and successfully completed his sentence. However, he was required to continue registration as a tier II sexual offender. D petitioned for a pardon with no objection from the State. Finding that D no longer posed a threat to the public, the Board recommended D for an unconditional pardon which was granted by the governor. D then filed a *pro se* motion to be free from future compliance with the sex offender registry. The State objected, arguing that registration serves an important societal function that outweighs the civil disability it places on D.

On appeal, the Court reasoned that since an unconditional pardon cannot be granted unless the Board and governor find no propensity for recidivism, it extinguishes the underlying premise for sex offender registration obligations. REVERSED.

KING V. STATE, (11/12/09): ADMINISTRATIVE SEARCH



A CI told police that D possessed an ounce of crack and a scale in his kitchen cabinet. Police had the C.I. call D to arrange sale. Police listened to his side of the conversation. The C.I. stated that D admitted to having crack in his house. Police were then able to confirm some facts the C.I. gave them about D, i.e. D's probation officer had visited him earlier in the day and his girlfriend lived at the house. The C.I. relayed information about other drug dealers that "checked out." Probation Officers monitored police interaction w/D through closed circuit TV but did not independently confirm the information re: possession of drugs. They worked w/police to conduct an administrative search. The search of D's house uncovered the crack and the scale as described by the C.I. D was convicted of trafficking, pwitd, maintaining a dwelling, and two counts of possession of drug paraphernalia.

On appeal, D argued that the judge erred by denying his motion to suppress the evidence found in his house because the administrative search was improper. However, the Court held that the officers satisfied all of the 5 requirements for an administrative

search under Probation Procedure 7.19. The Court also noted that nighttime administrative searches only require a justifiable reason, not exigent circumstances. Even so, there were exigent circumstances in this case as officers were concerned that D may destroy the evidence. AFFIRMED.

WASHINGTON V. STATE, (11/16/09): ADDICTS & LAY OPINIONS

P observed D engage in what appeared to be a drug transaction with W. P arrested the buyer and arrested D for selling drugs after they found a significant amount of what was later tested as heroin near where the transaction occurred. After W was arrested, he told p he went there to buy heroin. He had been an addict for 13 years. He noted that he was not a pharmacist but the substance could very well have been ground up Oxycontin or Percocet because those substances have similar effects as heroin. At the conclusion of the State's case-in-chief, D moved to dismiss the charges of delivery of heroin and loitering. The trial judge reserved decision. The motion was raised again two weeks later and denied as untimely.

On appeal, the Court reviewed the motion as if it was timely. It concluded that the motion should have been denied because a rational trier of fact, when taking the evidence in the light most favorable to the State, could have found D guilty beyond a reasonable doubt. The buyer, as an addict, was able to identify the substance purchased with a reasonable degree of certainty. In addition, drugs that were found near the site of the sale were tested by the medical examiner and determined to be heroin. AFFIRMED.

BOYER V. STATE, (11/16/09): RIGHT TO SELF REPRESENTATION

D was charged with drug-related offenses. At several pre-trial proceedings he had requested court-appointed counsel but refused to interview with the PD. At final case review, the court granted a 2 week continuance so that he could obtain a PD. D then filed several motions *pro se*. Prior to trial, D expressed dissatisfaction with his attorney and the attorney moved to withdraw. The trial court then allowed D to represent himself after informing D that he would have to adhere to the rules of the court, the rules of evidence and "all those other things."

On appeal, D argued that the trial court erred by failing to inquire adequately whether he knowingly and intelligently requested to proceed *pro se*. The Court held that when making the inquiry, a judge should follow the federal guidelines enunciated in *United States v. Welty*. Here, the judge only advised D of two *Welty* elements. The judge

was required to advise D of the nature of the charges, rights waived, and sentencing consequences before accepting a knowing and intelligent waiver of his Sixth Amendment right to counsel. REVERSED.

MILES V. STATE, (11/23/09): MOTION TO SUPPRESS; POLICE COMMENTS; 3507 STATEMENTS

D shot cashier in the abdomen at convenience store. P obtained D's identity through a still photograph. P attempted to arrest him at work but he was not there. Shortly thereafter, they arrested him in his car. P provided *Miranda* then interrogated D for about 1 ½ hours where D denied involvement. Five hours later, D told P he wanted to talk. P did not "re-mirandize" D. This time D claimed he was involved in the shooting because V had asked him to kill her. D was convicted of attempted murder 1st and possession of a deadly weapon by a person prohibited.

***MIRANDA*:** On appeal, D argued that he should have been given a *Miranda* warning before making a second statement to P. The Court applied the test in *Ledda v. State* and held that the only fact in consideration was that the second statement was substantially different then the first. The time lapse between the 2 statements was not significant; they were at the same location; it was the same officer. The Court concluded that the judge did not abuse his discretion in finding that the one factor was not sufficient to prevent admission of the statement.

POLICE COMMENTS: D also argued that the judge erred in failing to require the State to redact portions of D's interrogation wherein the officer made comments about the strength of the State's case and the lack of D's credibility. The Court concluded that the tape should have been redacted. However, the error was harmless because the evidence of guilt was overwhelming.

3507: D argued that W's statement should not have been admitted under 3507 when she could not remember what was said during the interview. Here, W testified that she remembered talking to P about D and a photograph in the newspaper and that she answered the questions truthfully and voluntarily. The Court concluded this was sufficient to "touch upon the statement" as is required to lay a proper foundation under 3507.

Finally, D argued that P should not have been permitted to provide an interpretive narrative of W's out of court statement in lieu of introducing the actual statement under 3507. The Court assumed that P provided an interpretive narrative but found no plain error. AFFIRMED.

SIMON V. STATE, (11/25/09): BOW AND ARROW/ "DEADLY WEAPON"

D is a "person prohibited" and a licensed hunter. One day, D was deer hunting when P arrested him for possessing a bow and arrow which P alleged was a "deadly weapon." After trial, D was convicted of PDWBPP.

On appeal, D argued that a bow and arrow is not a "deadly weapon" as defined in 11 *Del. C.* § 222(5). The Court noted that while a bow and arrow is not listed in the definition of "deadly weapon," it would be impossible to list every item that could fit into that category. The primary function of a bow and arrow is to kill or seriously injure which is the common usage of a "deadly weapon." AFFIRMED.

MERCER V. STATE, (11/25/09): PHYSICAL INJURY/KIDNAPPING

V was in her bedroom early in the a.m. when she was alerted that D was in her house. Thereafter, D engaged V in several acts of sexual intercourse, made her wash and shave herself, engaged in more sexual acts then made V wash herself again. After V tried to get away, D knocked her down the stairs. V then got out of the house through a window. D was convicted of multiple counts of rape 1st, kidnapping 1st, and burglary 1st.

On appeal, D argued that the State failed to prove burglary 1st because it failed to show that V suffered "physical injury" which requires a showing of an "impairment of physical condition or substantial pain." The recent case of *Harris v. State* concluded that scratches on a knee were not sufficient to establish this element. Here, however, swelling, bruising and several abrasions satisfied the element. The injury occurred during the violent and brutal rape, even though the victim did not use the language of the statute: "substantial bodily harm."

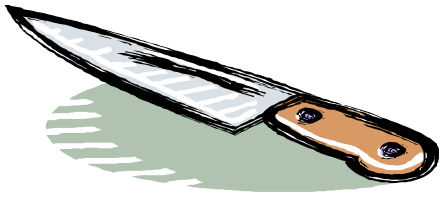
D also argued that the State failed to prove kidnapping 1st because it failed to establish that D held V longer than was necessary to complete the sexual crimes. The Court affirmed the conviction, citing *Burton v. State*, where the victim was kidnapped when forced to move from room to room to commit further sexual assaults. Here, D acted in the same way, moving V from room to room to further rape her. AFFIRMED.

SMITH V. STATE (12/3/09): POST-CONVICTION RELIEF/ INEFFECTIVE ASSISTANCE OF COUNSEL

D was convicted of felony murder, murder second, robbery first (2 counts), PFDCF (4 counts), and conspiracy second. D's convictions were affirmed on direct appeal and D moved for post-conviction relief. D argued he received ineffective assistance of counsel because his attorney did not: object to omitting the part of the accomplice-liability jury instruction involving the conviction of D's accomplice; federalize the objections to the court's refusal to instruct the jury on self-defense; or question the venire about whether they saw D when he was cuffed in their presence.

In affirming the denial of his motion, the Court explained D must meet a two-part ineffective assistance test: "(1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." D's attorney's decision to omit the portion of the accomplice liability instruction involving the accomplice's conviction was a reasonable tactical decision and was not ineffective. Further, the Court did not consider the failure to preserve the self-defense jury instruction for *habeas corpus* review prejudicial. Lastly, D has not shown that his attorney's tactical decision not to question the jury about seeing D in handcuffs so as not to highlight D's incarceration was unreasonable or prejudicial. AFFIRMED.

ROBINSON V. STATE, (12/8/09): SELF-REPRESENTATION/PDWPP



Pro se D was convicted of PDWPP after police found a steak knife in D's pocket. A sidebar conference was held at trial in which the judge, prosecutor, and D's standby counsel participated. After sidebar, the prosecutor withdrew the objection that prompted the conference. On appeal, D argued he was denied his right to self-representation because he did not participate in the sidebar and D argued the trial court should have acquitted D *sua sponte* because the State did not prove use indicating the steak knife was a deadly weapon.

In affirming, the Court found that D's right to self-representation was not denied. D did not object to standby counsel participating in the sidebar and the jury was unlikely to believe D was not representing himself because he was actively managing his own defense. The Court further stated that a steak knife is a *per se* deadly weapon and that the State need not prove use because the mere possession of the deadly weapon is prohibited. AFFIRMED.

MITCHELL V. STATE, (12/8/09): ROBBERY/MANIFEST INJUSTICE

D was convicted of robbery first for threatening a bank teller that someone with D had a gun and would shoot if D didn't get money. D testified at trial and the prosecutor asked D about D's later statement to police that he didn't have any guns. D started to explain "I was accused of robbing-" when the trial judge interrupted and held a sidebar. On appeal, D argued there was only sufficient evidence for a robbery second conviction and that the prosecutor engaged in misconduct by asking D about prior convictions.

In affirming, the Court explained that, for robbery first, the State must prove V subjectively believed that D objectively manifested control of a deadly weapon. The Court addressed *Walton* (D's putting his hands in his pocket did not substantiate Walton's threat of having a bomb). The Court explained that the General Assembly changed the robbery first statute after *Walton* to include when "any person represents by word…that they are in possession or control of a deadly weapon…." Here, sufficient evidence supported the conclusion that a rational trier could have found that D could cause someone to shoot the V or others. Second, the prosecutor did not engage in misconduct because D voluntarily offered information about his prior convictions. This testimony was immediately interrupted and D has not shown manifest injustice. AFFIRMED.

BAKER V. STATE (12/9/09): MOTION FOR NEW TRIAL/ SANDBAGGING

D was convicted of manslaughter and PFDCF. D argued she was sandbagged by the prosecutor at trial when the prosecutor raised new arguments in rebuttal after D closed which deprived D of an opportunity to respond. In affirming, the Court rejected Baker's claim because the vast majority of the rebuttal responded to points made by D's attorney during closing. D was not deprived of an opportunity to reply. AFFIRMED.

VESSELS V. STATE (12/16/09): SENTENCING

D was sentenced to 26 years at Level 5 for manslaughter, PFDCF and PDWPP. D was facing a mandatory minimum of 8 years for the combined offenses and the State recommended 15 years. D argued the trial court erred in sentencing him because D's 26 year sentence exceeded the mandatory minimum, the SENTAC guidelines, and the State's recommendation. In affirming, the Court stated that the sentence was not illegal and did not constitute an abuse of discretion. The SENTAC guidelines do not provide a right of appeal. AFFIRMED.